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No. 75-807

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In the Supreme Court of the United States

OCTOBER TERM, 1975

PAUL T. WIGODA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Paul T. Wigoda, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 20, 1975.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 521 F.2d 1221, and is reprinted as Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on August 20, 1975. A timely Petition for Rehearing and Suggestion of Rehearing en banc was filed, ordered answered, but denied on November 6, 1975. (Appendix C, *infra.*) This Petition is filed within thirty days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant in a criminal case is deprived of a fair trial, as guaranteed by the due process clause of the Fifth Amendment, and the right to confront witnesses, as guaranteed by the Sixth Amendment by a prosecutor's opening final argument which asks the jury to infer the contents of certain conversations, not admitted into evidence, and which, thereby, bolsters the credibility of the principal prosecution witness by suggesting that the prosecutor and the government possess knowledge of facts, which the government has not been allowed to reveal to the jury, showing that the defendant had demanded or been promised the money he was alleged to have received as a bribe?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *

STATEMENT

Petitioner, a Chicago Alderman, was charged in one count with filing a false 1969 income tax return by failing to report, in his adjusted gross income, $50,000 which he was alleged to have received as a bribe.[1] At the jury trial which followed, government witness Robert Haskins testified, under a grant of immunity, that he gave petitioner an envelope which had been given him by Roy Gottlieb. (Tr. 122-24)[2] Gottlieb testified this envelope contained $50,000. (Tr. 272)

The $50,000 was accumulated by Gottlieb and his associates in a real estate venture after their successful efforts to have certain property rezoned. The government proposed to show that the developers raised this money as the result of a conversation between Gottlieb and Haskins, who served as attorney for the developers during the rezoning efforts. During the conversation, which took place within a two or three week period following passage of the City Ordinance approving the zoning change, Haskins told Gottlieb to obtain $50,000 because he (Haskins) needed "to spread it out." (Tr. 225-c; R. 46) It was acknowledged by the government during trial that this conversation did not incriminate Petitioner. (R. 46) Because of the potential

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[1] A second count, charging petitioner with extorting, under color of official right, the $50,000, was dismissed by the government prior to trial. See App. A, *infra*, p. 2, n. 1.

[2] "Tr. ...." references are to the page of the transcript of evidence at trial, filed in the Court of Appeals. "R. ...." references are to the page of the trial record filed in the Court of Appeals. No Appendix was prepared or filed. See Rule 30, Fed. R. App. Pro., 28 USCA; Rule 24, Rules of the United States Court of Appeals for the Seventh Circuit, 28 USCA.

prejudicial nature of the conversation, as well as the lack of necessity of showing Gottlieb's state of mind in this income tax prosecution, the district judge refused to allow the conversation into evidence. (Tr. 225-c, 226)

Although he had conversations with Petitioner during the period the applications to rezone his property were being considered, Gottlieb never spoke to Petitioner about a payoff; Petitioner did not solicit and Gottlieb did not offer payments of money in any connection. (Tr. 317-18, 324, 331, 337-38)

The government did introduce, through Haskins' testimony, evidence that Haskins and Petitioner had two conversations—one preceding and one following passage of the approving City Ordinance—"concerning" the subject property. Although the defense made no effort to bar admission of the contents of these conversations, the government did not seek to elicit the contents from its witness. (Tr. 115-16; 116-17) Although no explanation for this failure was offered during trial, the government stated during oral argument before the Seventh Circuit "that its failure was predicated upon inability, for various reasons, to predict Haskins' answer." (App. A, *infra*, p. 18 n.8) However, at least one week prior to the commencement of trial, when he read notes of a conversation between Haskins and an attorney investigating another matter, the prosecutor knew that Haskins had said, immediately following the return of the indictment here, that he had never talked about money with Petitioner in relation to the property which was the subject of this case. (Tr. 289-90)

Gottlieb brought the envelope containing the $50,000 to Haskins sometime around April 8, 1969. The envelope was sealed. Gottlieb did not tell Haskins to give the envelope or its contents to Petitioner. (Tr. 338) Haskins did not open the envelope. (Tr. 122) On prior occasions he had re-

ceived envelopes of similar size and shape from Gottlieb or Gottlieb's associate. (Tr. 198, 489) Haskins said that, after receiving the envelope, he telephoned Petitioner, and then personally delivered the envelope to Petitioner, whom he met at the doorway to Petitioner's private law office. Petitioner did not open the envelope in Haskins' presence, nor did the two men converse about the envelope, other than Haskins' saying that Gottlieb wanted him to give it to Petitioner. (Tr. 122-124)

Haskins was impeached in several respects by a statement he gave within a few days after the return of this indictment to an attorney representing another client in another matter. Haskins told this attorney that Gottlieb had come to his office and had given him a sealed envelope, as he had done many times in the past. Haskins said he could not describe the envelope and did not know whether it was large or small. (Tr. 489) He had no reason to suspect that this envelope contained money. His clients had never mentioned or suggested giving money to Petitioner. (Tr. 490-92)

He told the attorney he had taken the envelope to Petitioner's office, but he was not sure whether Petitioner was in the office at the time, and he did not know to whom he gave the envelope. He said it was possible that he gave the envelope to one of the office girls, or put it by the receptionist's desk. (Tr. 489)

Finally, Haskins told the lawyer he had never talked about money in relation to the property with Petitioner. (Tr. 489-90)

Testifying in his own behalf, Petitioner denied receiving money as described by Haskins, or receiving an envelope. (Tr. 646, 648, 650-51) In addition, the defense presented testimony showing that Petitioner played an insig-

nificant role in the processes whereby zoning change applications received initial approval from those agencies empowered to consider such requests, and ultimate approval from those municipal bodies who relied on the expertise of the agencies. (E.g., Tr. 475, 553, 560, 568, 570-72, 576; Defendant's Ex. 5)

In the opening portion of his final argument, in order to explain why Gottlieb would give Haskins an envelope containing $50,000 with instructions to give the envelope to Petitioner, after passage of the amending ordinance, when Petitioner and Gottlieb had not had conversations concerning the payment of money, and when there was no evidence of conversation between Petitioner and Haskins concerning the payment of money, government counsel argued as follows:

> "Paul Wigoda is not going to deal with Roy Gottlieb. Paul Wigoda is smart. He is not going to front himself to every land developer in the city. Paul Wigoda is going to deal with or through someone like Robert Haskins who is a bag man lawyer who handles zoning matters, and that is the way the thing went down.
>
> "Think about it: The bag man Haskins has a conversation with Wigoda, the bag man goes to the developers, the developers then get the money and bring the money back to the bag man and the bag man delivers it to the defendant Wigoda. That is why Roy Gottlieb testified he never ever, ever told Haskins to take that money to Wigoda or that Wigoda ever asked for any money. That is absolutely true. I don't doubt it for a moment that Wigoda never asked for any money because Wigoda is not going to front himself to Roy Gottlieb or Kenneth Tucker. He is going to deal with someone like Haskins because Haskins is the middle man. He is the bag man. That is the way he was used in this case.

> "*Now, it doesn't really matter what took place in those conversations between the parties that were not admitted into evidence.* However, you, the eleven jurors, may use your common sense and you may call upon your own human experience and common sense and *I don't think you have any difficulty in inferring what was said in these conversations.*" (Tr. 927-28; emphasis added.)

After defense counsel objected, the District Judge ruled that:

> "I think the lawyers are entitled to make such logical inferences as the evidence warrants. It is up to the jury to judge those inferences which are not warranted and they may certainly disregard them." (Tr. 928)

Following an adverse jury verdict and denial of his motion for a new trial, during which the District Judge opined that the foregoing argument by government counsel was error, but "not sufficiently prejudicial to warrant a new trial" (R. 51, pp. 12-15), petitioner was sentenced to one year in the custody of the Attorney General.

The Court of Appeals opined that the argument was harmless error which "so closely bordered on impropriety as to deserve criticism." (App. A, *infra*, p. 17) Similarly, while viewing the argument as a "request for a common sense inference as to the contents of certain conversations [and] * * * not really germane to the crucial credibility question facing the jury" (App. A, *infra*, p. 17), the Court felt it "unbecoming for the government to omit inquiry [of its own witness] and then to urge the jury to draw an inference favorable to the government's case." (App. A, *infra*, p. 18) In sum, the Court concluded that the argument was "at least the type of close-to-the-line conduct government counsel should avoid," but did not affect the outcome of this trial. (App. A, *infra*, p. 18)

REASON FOR GRANTING THE WRIT

Both courts below have recognized that the prosecutor's argument in this case was improper. Both courts agree that this argument merited criticism. What the courts below have failed to recognize, however, is that this argument deprived petitioner of those Fifth and Sixth Amendment rights which insure the fundamental fairness of a criminal trial.

Berger v. *United States*, 295 U.S. 78, 88 (1935) set the standard by which a prosecutor's conduct must be tested:

> "[The prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

But the problems inherent in the closing argument in this case transcend those considered in *Berger*. The argument directly and falsely suggested to the jury that the government had evidence that Haskins had told Gottlieb Petitioner wanted money. It also told the jury the government had evidence that Haskins and Petitioner had discussed a payoff in their unoffered conversations. The full

context of the argument—which was expressly designed to explain, if it could, Gottlieb's adamant denial that petitioner had ever asked for or been promised money—demonstrates that the jurors were forcefully told they could infer: (1) that petitioner had asked Haskins for money, or been promised money by Haskins; and (2) that Haskins had told Gottlieb he wanted the money for petitioner. Once permitted to believe that the government had evidence which it could not introduce to support these inferences, the jury could ignore the very serious probability that Haskins had defrauded his own clients by keeping the money which Gottlieb delivered to him. Thus, by arguing in this fashion, the prosecutor explained for the jury why petitioner should be paid money in the manner described by Haskins when, according to the evidence, petitioner had not asked for or been promised money by anyone.

In this connection, the prosecutor explicitly told the jurors he was privy to the contents of the two unrevealed conversations, but the jurors were not, because the conversations themselves "were not *admitted* into evidence." (Tr. 928; emphasis supplied.) There could be no other reason for the prosecutor's referring to these conversations in this fashion if it were not for the forbidden purpose of conveying the impression that he knew the contents but somehow had been proscribed by the rules of evidence from revealing them to the jurors. *United States* v. *Fearns*, 501 F.2d 486 (7 Cir. 1974), and *United States* v. *Martinez*, 514 F.2d 334 (9 Cir. 1975), apply precisely to this sort of tactic.

This case does not merely question the right of a prosecutor to ask a jury to draw inferences. It questions the propriety of dangling logical inferences before a jury when

it is known that the inferences which have been dangled are spurious. *Cf. Napue* v. *Illinois,* 360 U.S. 264 (1959); *United States ex rel. Miller* v. *Pate,* 386 U.S. 1 (1967); *Mooney* v. *Holohan,* 294 U.S. 103 (1935); *United States* v. *Newman,* 3 Cir. 1974, 490 F.2d 139, 147. The government knew that Haskins had not talked to Gottlieb about paying money to Petitioner, yet it blatantly suggested that the jury reach that conclusion. The government intentionally withheld evidence of the Petitioner-Haskins conversations—at oral argument we learned, because it had been advised prior to trial that Haskins would not take an oath that those conversations related to money—and yet it asked the jury to infer that they related to payments of money. No matter what the prosecutor felt about Haskins' purported recantations, there was still no evidence of the type of conversation suggested by the argument. *Berger's* admonition concerning the faith and confidence juries place in such statements by a prosecutor is most applicable here, for, despite the total lack of such evidence, the prosecutor conveyed to the jury the government's assumed intimate knowledge that a conversation concerning money had taken place between Haskins and Petitioner.

The prosecutor's seeming withdrawal of his remarks following defense objection did not cure the false impression created by the initial statements. Counsel had already told the jury he had *evidence* which had not been "admitted" concerning the substance of the conversations. His "curative" statement was illusory. He did not disavow knowledge, or existence, of the suggested conversations. He merely told the jury, in substance, that whether Petitioner had asked or demanded, or whether Haskins and Gottlieb had promised without a demand, made no difference. That was the clear and only import of this statement that Petitioner was charged with a

"simple crime," receiving $50,000 "for whatever reason," and not reporting it. (Tr. 928)

Finally, the nature and effect of the District Judge's ruling when objection to this tactic was made has been misconstrued. The District Judge's initial ruling that "the lawyers are entitled to make such logical inferences as the evidence warrants" told the jury that, if they found the prosecutor's argument logical and appealing, they were free to draw the inferences which the prosecutor had suggested they draw.

At this juncture the District Judge did more harm than good, for the prosecutor's argument, however erroneous and improper, was appealing and logical. Its error was that it went beyond fact and encouraged the jury to follow the alluring path of logic to an admittedly erroneous conclusion.

The misconception concerning the effect of the District Judge's ruling seems to have been carried over in the Opinion's assessment of the impact of the prosecutor's argument on the jury. This is apparent from the conclusion that "the prosecutor's request for a common sense inference as to the contents of certain conversations is not really germane to the crucial credibility question facing the jury." (App. A, *infra*, p. 17) The argument, however, was a device intended to create an illusion of credibility for Haskins before the jury. The jury had been asked by the defense to reject Haskins' testimony partly on the basis of a latent but crucial conflict between Haskins and Gottlieb and on the further basis that Haskins' version—without evidence of a demand by, or promise to, Petitioner—made no sense. Gottlieb said, in addition to denying that Petitioner had ever asked for money, that he "absolutely"

did not tell Haskins to give the envelope to Wigoda. (Tr. 338) Haskins, on the other hand, said he did not know what was in the envelope and said that he told Wigoda, upon giving him the envelope, "Gottlieb wanted me to give you this." (Tr. 123-4) In view of Gottlieb's denial and the absence of any testimony suggesting a demand by, or promise to, Petitioner, the jury at this point could well have concluded that Haskins was lying when he said he did not know the contents of the envelope, that he was lying when he said that Gottlieb told him where to deliver it, and that he was lying when he said that he delivered it to Petitioner.

However, once told by the prosecutor that there were conversations between Haskins and Gottlieb and Haskins and Petitioner concerning this subject which had not been admitted into evidence, the jury could swing to Haskins' corner believing that the law of evidence was responsible for this significant discrepancy rather than Haskins himself. See *United States* v. *Newman*, 3 Cir. 1974, 490 F.2d 139, 147.

As the Record stands, Petitioner never asked for the money he was accused of receiving, nor had anyone ever offered or promised that money to him. Yet the jury considered this case under the impression that there was "evidence" showing that petitioner had solicited or agreed to the alleged payoff. There was no way for Petitioner to combat this false impression. He could not face his accuser. Having been allowed to believe that the government had evidence Petitioner had asked for the money, the jury could then easily conclude that he had received it, despite the improbability of his having done so.

CONCLUSION

For the above and foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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